

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JC PICKETT, a minor child, KV
PICKETT, a minor child, ANESSA
PICKETT, an individual, IAN
PICKETT and KHALIA PICKETT,
husband and wife, both individually
and on behalf of their minor children,

Plaintiffs,

v.

TEMPORARY HOUSING, INC.,
d/b/a CRS TEMPORARY
HOUSING,

Defendant.

NO. 2:21-CV-0174-TOR

ORDER GRANTING IN PART
DEFENDANT'S SECOND MOTION
TO DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss (ECF No. 11).

This matter was submitted for consideration without oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Defendant's Motion to Dismiss (ECF No. 11) is **GRANTED in part.**

ORDER GRANTING IN PART DEFENDANT'S SECOND MOTION TO
DISMISS ~ 1

BACKGROUND

This case concerns an insurance dispute that arose after a fire destroyed Plaintiffs' home. *See* ECF No. 9. On May 21, 2021, Plaintiffs filed a complaint against Defendant. ECF No. 1. On August 3, 2021, the Court granted Defendant's motion to dismiss Plaintiffs' constructive fraud claim and granted Plaintiffs leave to amend their complaint within 21 days. ECF No. 8.

On August 24, 2021 Plaintiffs filed an amended complaint. ECF No. 9. The amended complaint raises the following causes of action: (1) violation of duty of good faith, (2) negligent claims handling, (3) violation of the Washington Consumer Protection Act ("CPA") pursuant to RCW 19.86.090, (3) CPA injunction, and (4) constructive fraud. ECF No. 9 at 7-10, ¶¶ 28-57.

On September 7, 2021, Defendant filed the present motion to dismiss, seeking to dismiss all of Plaintiffs' claims. ECF No. 11. The parties timely filed their respective response and reply. ECF Nos. 13, 15.

FACTS

The following facts are drawn from Plaintiffs' amended complaint and are accepted as true for the purposes of the present motion. *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

On August 11, 2018, Plaintiffs lost their home to a fire in Kettle Falls, Washington. ECF No. 9 at 3, ¶¶ 8-10. Plaintiffs' home was destroyed and as a

1 result, they suffered a total loss due to the fire. ECF No. 9 at 3, ¶ 12-13. Plaintiffs
2 paid insurance premiums to receive coverage for their home and personal property
3 through a policy issued by third-party Liberty Mutual Insurance Company. ECF
4 No. 9 at 3, ¶ 9. The policy included the benefit of additional living expenses
5 (“ALE”) following a covered loss. ECF No. 9 at 3, ¶ 11.

6 Liberty Mutual hired Defendant to “assist” Plaintiffs with providing ALE
7 benefits. ECF No. 9 at 3, ¶ 14. Pursuant to an agreement, Liberty Mutual
8 incentivizes Defendant to pay as little as possible on ALE claims to maintain and
9 support the business and income Defendant receives from Liberty Mutual. ECF
10 No. 9 at 4, ¶ 22. Defendant did not disclose the details of its business relationship
11 or financial interest with Plaintiffs. ECF No. 9 at 4, ¶ 23. Defendant was
12 motivated by its own financial interest to keep payment of ALE benefits as low as
13 possible to the detriment of Plaintiffs. ECF No. 9 at 5, ¶ 24.

14 Liberty Mutual paid for Plaintiffs to stay in various hotels and a trailer for a
15 short period of time, neither of which provided the standard of living Plaintiffs
16 were promised. ECF No. 9 at 3, ¶ 15. Liberty Mutual terminated Plaintiffs’ ALE
17 benefits after twelve months despite there being no ALE coverage limit and a
18 policy that provided a period of repair, restoration, or permanent relocation. ECF
19 No. 9 at 4, ¶ 16. Plaintiffs had to relocate out of Washington State to live with
20 family. ECF No. 9 at 4, ¶ 17.

1 During the year following Plaintiffs' loss, Defendant (1) failed to explain to
2 Plaintiffs their ALE rights and benefits under the policy, (2) did not tell Plaintiffs
3 that their ALE coverage permitted them to purchase a home to live in during the
4 course of repairs given the limited rental market in the area, (3) failed to perform a
5 full or fair investigation into Plaintiffs' standard of living, and (4) failed to perform
6 a full and fair investigation into all alternative housing options available to
7 maintain Plaintiffs' standard of living in their geographical location. ECF No. 9 at
8 4, ¶¶ 18-21.

9 During the year following Plaintiffs' loss, Defendant negligently or
10 intentionally failed to explain or provide a full measure of the ALE benefits
11 covered under the policy, including that Defendant (1) failed to inform Plaintiffs of
12 their rights and benefits under the policy, (2) never investigated the needs of the
13 Plaintiff children, (3) never treated the Plaintiff children as insureds, (4) never
14 familiarized itself with the available temporary housing options in the vicinity of
15 Plaintiffs' home, (5) never sent anyone to meet with Plaintiffs, (6) failed to explore
16 the purchase of a temporary home, (7) failed to schedule motel stays for more than
17 a week which necessitated multiple moves for the family, (8) never responded
18 appropriately to Plaintiffs' expressions of distress when forced to live in
19 unsatisfactory conditions, (9) shamed Plaintiffs into believing they were not
20 entitled to a standard of living comparable to that which existed pre-loss, (10)

1 suggested a “travel trailer” be brought to the property and that this was the “only
2 option” that could keep the family together in their school district, (11) promised a
3 winterized trailer but provided one from Arizona that was too small and not
4 winterized, and (12) contended that it was Plaintiffs’ obligation to perform the full
5 and fair investigation into the material components of Plaintiffs’ ALE claim. ECF
6 No. 9 at 5-6, ¶ 25.

7 Notably, Plaintiffs removed the allegation that “Defendant is an adjuster and
8 is charged with the duties and responsibilities of an adjuster under Washington
9 law” that was alleged in the original complaint. ECF No. 1 at 3, ¶ 14.

10 DISCUSSION

11 A. Motion to Dismiss

12 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may
13 move to dismiss the complaint for “failure to state a claim upon which relief can be
14 granted.” “The burden of demonstrating that no claim has been stated is upon the
15 movant.” *Glanville v. McDonnell Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).
16 A motion to dismiss for failure to state a claim will be denied if the plaintiff alleges
17 “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
18 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*
19 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “The burden of demonstrating
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1 that no claim has been stated is upon the movant.” *Glanville v. McDonnell*
2 *Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).

3 While the plaintiff’s “allegations of material fact are taken as true and
4 construed in the light most favorable to the plaintiff” the plaintiff cannot rely on
5 “conclusory allegations of law and unwarranted inferences ... to defeat a motion to
6 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
7 1403 (9th Cir. 1996) (citation and brackets omitted). That is, the plaintiff must
8 provide “more than labels and conclusions, and a formulaic recitation of the
9 elements.” *Twombly*, 550 U.S. at 555. When deciding, the Court’s review is
10 limited to the complaint, documents incorporated into the complaint by reference,
11 and judicial notice. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d
12 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551
13 U.S. 308, 322 (2007)).

14 **B. Whether Defendant is an “adjuster”**

15 As an initial matter, the parties dispute whether Defendant is an “adjuster”
16 under Washington law as alleged in the amended complaint. ECF Nos. 11 at 10,
17 13 at 13-16.

18 Under Washington law, an “adjuster” is defined as “any person who either
19 investigates and negotiates settlement relative to insurance claims, or applies the
20 factual circumstances of an insurance claim to the insurance policy provisions, or

1 both, arising under property and casualty insurance contracts.” RCW
2 48.17.010(1). In turn, a “person” is defined as “an individual or a business entity.”
3 RCW 48.17.010(12). Moreover, “[a] person may not act as or hold himself or
4 herself out to be an adjuster in this state unless licensed by the commissioner or
5 otherwise authorized to act as an adjuster under this chapter.” RCW 48.17.060(2).

6 Here, Plaintiffs removed the allegation that “Defendant is an adjuster and is
7 charged with the duties and responsibilities of an adjuster under Washington law”
8 that was alleged in the original complaint. ECF No. 1 at 3, ¶ 14. Plaintiffs now
9 assert that they “did not ‘drop’ any allegation that CRS acted as an adjuster under
10 Washington law. The claims were presented differently and factually focused to
11 comply with the Court’s request. This does not prevent a later finding that CRS
12 falls under the statutory definition of ‘adjuster.’” ECF No. 13 at 5, n. 8. Plaintiffs
13 do not allege that Defendant was hired to act as an adjuster nor do they allege that
14 Defendant performed the tasks of an adjuster. Plaintiffs merely allege that Liberty
15 Mutual hired Defendant to “assist” Plaintiffs with providing ALE benefits. ECF
16 No. 9 at 3, ¶ 14. The Court finds that Plaintiffs’ amended complaint lacks factual
17 allegations that are sufficient to find that Defendant is an insurance adjuster under
18 Washington law. RCW 48.17.010(1).

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1 **C. Whether Defendant owed Plaintiffs any duty**

2 Defendant asserts that it did not owe any duty to Plaintiffs outside of the
3 duties set forth in the parties' contract. ECF No. 11 at 9. Plaintiffs did not plead
4 breach of contract. ECF No. 9. Plaintiffs contend that Defendant owed them
5 duties by statute and common law due to Defendant's status as an "adjuster." *See*
6 ECF Nos. 9 at 7-9; 13 at 13-16.

7 Duties may be created by statute or common law. *Bernethy v. Walt Failor's,*
8 *Inc.*, 97 Wash. 2d 929, 932 (1982). For duties under common law, courts
9 "consider logic, common sense, justice, policy, and precedent, as applied to the
10 facts of the case, when determining whether a defendant owes a duty in tort."
11 *Certification from the United States Ct. of Appeals for the Ninth Cir. in Centurion*
12 *Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wash. 2d 58, 65 (2016) (internal
13 citation omitted). "Whether an individual has a duty in the first instance is a
14 question of law." *Kim v. Lakeside Adult Family Home*, 185 Wash. 2d 532, 548
15 (2016) (internal citation omitted).

16 As mentioned *supra*, Plaintiffs fail to allege that Defendant is an adjuster.
17 Even if Defendant were pled as an adjuster, Plaintiffs cannot rely on RCW
18 48.01.030 to establish a statutory duty for their breach of duty of good faith nor a
19 *per se* CPA claim because Defendant is not the insurer in this case. *See Keodalah*
20 *v. Allstate Ins. Co.*, 194 Wash. 2d 339, 351-53 (2019) ("[J]ust as this court has

1 limited bad-faith tort claims to the context of the insurer-insured relationship, so
2 has it limited CPA claims based on breach of the statutory duty of good faith.”¹);
3 *Kosovan v. Omni Ins. Co.*, ---P.3d---, No. 54904-2-II, 2021 WL 4539640, at *5
4 (Wash. Ct. App. Oct. 5, 2021) (finding non-insurer third-party not liable where
5 there is no privity of contract, no insurance provided, and no relationship of trust
6 and underlying dependence similar to the insured-insurer relationship).

7 Moreover, based on the current allegations that fail to plead Defendant as an
8 adjuster, the Court cannot say that “logic, common sense, justice, policy, and
9 precedent” dictate that Defendant owes Plaintiffs duties under the common law.
10 *Keodalah*, 194 Wash. 2d at 358. With mere legal conclusions that Defendant owed
11 Plaintiffs duties outside of their contract, ECF No. 9, Plaintiffs fail to state a
12 necessary element for claims of the violation of duty of good faith, negligent
13 claims handling, and constructive fraud. Therefore, these claims must be
14 dismissed.

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18 ¹ As pointed out by the dissent, the majority did not explicitly preclude
19 common law bad faith claims against adjusters. *Keodalah*, 194 Wash. 2d at 356-
20 358.

1 **D. Consumer Protection Act**

2 Defendant asserts Plaintiffs have failed to state a claim for unfair and
3 deceptive business practices on the grounds that Plaintiffs rely on conclusory
4 statements, a breach of contract claim does not affect the public interest, and
5 Defendant owed Plaintiffs no duty outside of the contract. ECF No. 11 at 12-13.
6 Plaintiffs assert that their complaint plausibly states a claim for a violation of
7 Washington’s Consumer Protection Act (“CPA”). ECF No. 13 at 9-11.

8 The Washington Consumer Protection Act (“CPA”) prohibits “[u]nfair
9 methods of competition and unfair or deceptive acts or practices in the conduct of
10 any trade or commerce.” RCW 19.86.020. “Any person who is injured in his or
11 her business or property by a violation of RCW 19.86.020 ... may bring a civil
12 action” to recover actual damages. RCW 19.86.090. To establish a non-*per se*
13 CPA claim, the plaintiff need not have a contractual or non-adversarial relationship
14 with the defendant. *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27,
15 41-42 (2009).

16 To prevail on a non-*per se* CPA claim, “the plaintiff must prove an (1) unfair
17 or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest
18 impact; (4) injury to plaintiff in his or her business or property; [and] (5)
19 causation.” *Klem v Washington Mut. Bank*, 176 Wash. 2d 771, 782 (2013)

1 (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.
2 2d 778, 780 (1986)).

3 *1. Unfair or Deceptive Act or Practice*

4 Under the first element, the plaintiff can demonstrate a deceptive act if the
5 “alleged act had the capacity to deceive a substantial portion of the public” even if
6 there was no intent to deceive. *Merriman*, 198 Wash. App. 594, 628 (quoting
7 *Hangman Ridge*, 105 Wash. 2d at 785). The plaintiff can demonstrate an unfair act
8 if the act “(1) causes or is likely to cause substantial injury which (2) consumers
9 cannot avoid, and (3) is not ‘outweighed by countervailing benefits.’” *Id.* (quoting
10 *Klem v. Wash. Mut. Bank*, 176 Wash. 2d 771, 787 (2013)). Whether an act
11 constitutes an unfair or deceptive practice is a question of law. *Columbia Physical*
12 *Therapy, Inc., P.S. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 168 Wash. 2d
13 421 (2010).

14 Here, some of Plaintiffs’ allegations amount to unfair or deceptive acts,
15 including that Defendant “[s]uggested a ‘travel trailer’ be brought to the property
16 and that this was the ‘only option’ that could keep the family together in their
17 school district [and] [p]romised a winterized trailer but provided one from Arizona
18 with no winterization.” ECF No. 9 at 6, ¶ 25(k)-(l). These actions have the
19 capacity to deceive a substantial portion of the public and/or is likely to cause
20 substantial injury that Plaintiffs could not avoid without any clear countervailing

1 benefits. *Merriman*, 198 Wash. App. at 628. Therefore, the first element is
2 satisfied.

3 2. *Trade or Commerce*

4 Under the second element, “trade” and “commerce” are defined to “include
5 the sale of assets or services, and any commerce directly or indirectly affecting the
6 people of the state of Washington.” RCW 19.86.010(2). Here, Defendant was
7 providing Plaintiffs services in the form of assisting with alternate housing in
8 Washington pending the construction of their new home. ECF No. 9 at 3, ¶ 14, at
9 5-6, ¶ 25. Therefore, the second element is satisfied.

10 3. *Public Interest*

11 Under the third element, “[o]rdinarily, a breach of a private contract
12 affecting no one but the parties to the contract is not an act or practice affecting the
13 public interest.” *Hangman Ridge*, 105 Wash. 2d at 790. However, a plaintiff can
14 establish that the private “lawsuit would serve the public interest by showing a
15 likelihood that other plaintiffs have been or will be injured in the same fashion.”
16 *Trujillo v. Nw. Tr. Servs.*, 183 Wash. 2d 820, 835 (2015) (internal citations
17 omitted). To assess the public interest in a private dispute, courts are guided by
18 “(1) whether the defendant committed the alleged acts in the course of his/her
19 business, (2) whether the defendant advertised to the public in general, (3) whether
20 the defendant actively solicited this particular plaintiff, and (4) whether the

1 plaintiff and defendant have unequal bargaining positions.” *Id.* at 836. No one
2 factor is dispositive. *Id.*

3 Here, Plaintiffs assert there is a public interest by statute – RCW 48.01.030.
4 ECF No. 13 at 11; *see also Hangman Ridge*, 105 Wash. 2d at 791. However, as
5 discussed *supra*, Defendant cannot be sued for a violation of RCW 48.01.030.
6 *Keodalah*, 194 Wash. 2d at 350; *Kosovan*, 2021 WL 4539640, at *7. Nonetheless,
7 Plaintiffs can establish public interest under the aforementioned factors in a private
8 dispute; the allegations show the acts were committed within the course of
9 Defendant’s business and it appears based on the allegations that Plaintiffs and
10 Defendant have unequal bargaining power. *Trujillo*, 183 Wash. 2d at 836.
11 Therefore, the third element is satisfied.

12 4. *Injury and Causation*

13 Under the fourth and fifth elements, the plaintiff can establish injury and
14 causation by showing “the deceptive act or practice proximately caused injury to
15 the plaintiff’s ‘business or property.’” *Panag*, 166 Wash. 2d at 63-64. Plaintiffs
16 allege Defendant’s deprivation of adequate housing forced them to move
17 frequently and eventually relocate to live with family California. ECF No. 9 at 4-
18 6, ¶¶ 17, 25. Therefore, the fourth and fifth elements are satisfied.

19 Plaintiffs adequately state all the elements for a non-*per se* CPA claim.
20 Therefore, dismissal of this claim is not warranted.

1 **E. Leave to Amend**

2 Rule 15(a)(2) instructs courts to “freely give leave [to amend] when justice
3 so requires.” “This policy is to be applied with extreme liberality.” *Eminence*
4 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal citation
5 and quotation marks omitted). However, a court may deny leave to amend “due to
6 undue delay, bad faith or dilatory motive on the part of the movant, repeated
7 failure to cure deficiencies by amendments previously allowed, undue prejudice to
8 the opposing party..., and futility of amendment.” *Zucco Partners, LLC v.*
9 *Digimarc Ltd.*, 552 F.3d 981, 1007 (9th Cir. 2009) (internal citation and quotation
10 marks omitted). Federal Rule of Civil Procedure 15(a) governs amendment of the
11 pleadings prior to the court’s filing of a pretrial scheduling order. *Johnson v.*
12 *Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992).

13 Here, Rule 15(a) applies where the Court has yet to file a pretrial scheduling
14 order in this case. As this case is in its early stages, the Court finds that justice
15 requires that Plaintiffs be able to freely amend their complaint. However, as stated
16 *supra*, even if Plaintiffs amend to assert that Defendant is an adjuster, Plaintiffs
17 cannot assert a breach of the statutory duty of good faith nor a *per se* CPA claim.
18 Therefore, any amendment in that respect is futile.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Defendant's Motion to Dismiss (ECF No. 11) is **GRANTED in part**.

3 2. Plaintiffs are granted leave to **AMEND** their complaint **within 21 days**
4 of this Order.

5 The District Court Executive is directed to enter this Order and furnish
6 copies to counsel.

7 DATED October 26, 2021.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge